NOT YET SCHEDULED FOR ORAL ARGUMENT
No. 16-1328 & 16-1396

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

PENNSYLVANIA STATE CORRECTIONS OFFICERS ASSOCIATION
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF PETITIONER/CROSS RESPONDENT PENNSYLVANIA STATE CORRECTIONS OFFICERS ASSOCIATION

Edward R. Noonan (D.C. Bar No. 55792)
Michael McAuliffe Miller (D.C. Bar No. 60250)
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
(717) 237-7182
enoonan@eckertseamans.com
mmiller@eckertseamans.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Other Authorities

GLOSSARY OF ABBREVIATIONS

Administrative Law Judge ("ALJ")

Administrative Procedures Act ("APA")

Business Agents Representing State Union Employees Association ("BARSUEA" or "Union")

National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* ("NLRA" or "Act")

National Labor Relations Board ("Board" or "NLRB")

Pennsylvania State Correctional Officers Association ("PSCOA" or "Employer")

Pennsylvania State Association of Correctional Officers and Business Agents Representing State Union Employees Association, 358 NLRB 108 (No. 19) (March 23, 2012) ("PSCOA I")

Pennsylvania State Association of Correctional Officers and Business Agents Representing State Union Employees Association, ALJ's Supplemental Decision and Order, (May 23, 2014) ("PSCOA II")

Pennsylvania State Corrections Officers Association *and* Business Agents Representing State Union Employees Association, 364 NLRB No. 108 (August 26, 2016) [Decision on Review] ("PSCOA III")

SUMMARY OF ARGUMENT

The Board's position that PSCOA failed to raise its arguments before the Board is wholly without merit. PSCOA raised each of its arguments here before the Board and this Court has jurisdiction to address PSCOA's arguments.

This Court should reverse the Board's decision because it is arbitrary, capricious, manifestly contrary to the statute and not supported by substantial evidence. The Board erroneously reached its decision that the impasse was unlawful by improperly judging the substantive proposals made in bargaining. It is well settled that the Board cannot dictate what terms, if any, must be offered in effects bargaining. Yet, despite these well settled limits on the Board's power, the Board here continues to support its decision based solely on its criticisms of the substantive proposals of PSCOA, while disregarding entirely the Union's like counterproposals. Moreover, even if the Board were permitted to judge the substantive proposals, the Board erred in finding the proposals caused the stipulated impasse to be unlawful. The Parties here bargained in good faith to a stipulated, lawful impasse and the Board should have recognized it as such. The Board's backpay remedy, which extended an additional 24 weeks beyond the stipulated impasse date, was a sanction against PSCOA in violation of the Act.

Even further, with respect to Bill Parke, the Board erroneously reversed the ALJ's finding that Parke failed to mitigate the backpay obligation. The Board

improperly shoehorned the unique facts of this case into its "traditional" mitigation framework. The Board's refusal to recognize Parke's failure to mitigate, as the ALJ recognized below, is arbitrary, capricious, manifestly contrary to the law and the statute, and not supported by substantial evidence. The Board's decision should therefore be reversed.

ARGUMENT

1. The NLRB's Remedy Under *Transmarine* Is Arbitrary, Capricious, Manifestly Contrary to the Statute, Not Supported by Substantial Evidence and Must Be Overruled.

The Board's fatuous claim that PSCOA waived arguments by failing to raise them before the Board is wholly without merit. This Court plainly has jurisdiction to address PSCOA's arguments. The Board erred in finding the impasse unlawful, and it did so by improperly judging the substantive proposals made in bargaining. Even if the Board were permitted to judge the substantive proposals made, the Board erred by finding the proposals caused the stipulated impasse to be unlawful. Instead, the parties bargained in good faith to a stipulated, lawful impasse and the Board's imposition of a backpay remedy – extending an additional 24 weeks beyond the stipulated impasse date despite the record facts and failure's of the Region – was effectively a fine levied on PSCOA in violation of the Act. The Board's decision therefore must be reversed.

A. The Board's Argument that this Court Lacks Jurisdiction to Consider PSCOA's Arguments Is Without Merit.

The Board's position that PSCOA failed to raise its arguments before the Board is wholly without merit as PSCOA raised its arguments before the Board. Section 10(e) of the Act does not require that Petitioner expressly state the ground for exceptions. Trump Plaza Associates v. NLRB, 679 F.3d 822, 829 (D.C.Cir. 2012) (quoting Parsippany Hotel Mgmt. Co. v. NLRB, 99 F.3d 413, 417 (D.C.Cir. 1996)). Instead, the Board requires "that the ground for the exception be evident to the context in which the exception is raised." Id. "In each case, the critical inquiry is whether the objections made before the Board were adequate to put the Board on notice that the issue *might* be pursued on appeal." Id. (citing Consol. Freightways v. NLRB, 669 F.2d 790, 794 (D.C.Cir. 1981)) (emphasis in original).

PSCOA raised multiple exceptions with respect to the ALJ's findings governing the substance of PSCOA's bargaining proposals in front of the Board. See PSCOA's Cross-Exceptions to the ALJ's Decision of May 23, 2014, at ¶¶ 2, 3, 4, 7, 17, 18. Specifically, PSCOA excepted to the ALJ's findings that its bargaining position "was contrary to the minimum back pay remedy in the Board's Order," id. at ¶ 3, that PSCOA improperly insisted to impasse on an illegal subject of bargaining, id. at ¶¶ 2, 4, and that a valid impasse was not reached as a result of PSCOA's bargaining proposals, id. at ¶ 2-4, 7, 17-18. In its briefing before the Board, PSCOA argued that a valid impasse was reached and there were no

allegations of bad faith. Brief of PSCOA in Support of its Cross-Exceptions, at 14. PSCOA asserted that for these reasons: "the inquiry over whether or not PSCOA fulfilled the requirements of the Board's order need go no further." Id. That any further inquiry would improperly intrude on the substantive aspects of bargaining was specifically raised, and, in any event, is necessarily encompassed within the exceptions and briefing. Trump Plaza Associates, 679 F.3d at 830. PSCOA's further assertion that the ALJ's consideration of the substance was wrongly decided does not change this result.

In addition, PSCOA argued that imposing a backpay award beyond the stipulated impasse date was excessive and punitive in its exceptions and briefing. See PSCOA's Cross-Exceptions to the ALJ's Decision of May 23, 2014, at ¶¶ 1, 7-8, 19-22. Indeed, in its briefing, PSCOA specifically asserted that the award, extending its backpay obligation through September 28, 2012, was a "sanction" on PSCOA. Brief of PSCOA in Support of its Cross-Exceptions, at 19. Black's Law Dictionary defines "sanction" as a "provision that gives force to a legal imperative by … punishing disobedience," and a "penalty or coercive measure that results from a failure to comply with a law, rule, or order." Black's Law Dictionary (10th ed. 2014). Simply because PSCOA used the synonym – "sanction" – as opposed to the words – "punitive," "punish," "penalty," or "fine" – does not mean that PSCOA failed to raise the argument in front of the Board. PSCOA specifically

excepted to the extension of its backpay obligation after the stipulated impasse date before the Board as an impermissible exercise of authority under the Act, as it did here.

Likewise, PSCOA specifically referenced a stipulation regarding impasse in front of the Board. See Board Br., at 29. Inexplicably, in attempting to claim that PSCOA never referenced a stipulation regarding impasse in its Brief, the Board cites (two sentences thereafter), to the Parties' Stipulation of Facts before the Board wherein PSCOA and the Union stipulated that the parties reached an impasse in bargaining on April 11, 2012. Board Br. at 29 (citing JX.7).

Indeed, PSCOA's filing in front of the Board is replete with references and reliance on the stipulated impasse and it is patently unreasonable for the Board to now suggest that PSCOA's position below – that there was a stipulated impasse and that this impasse was proper and lawful – is inconsistent with its position before this Court. See, e.g., Brief of PSCOA in Support of its Cross-Exceptions, at 8-9, 11, 13-14 (citing Tr: 4/14/12, at 36, 40-41) ("Both Mr. Sonnie and Mr. Blackwell testified at the hearing that they specifically agreed that the parties were at impasse on April 11, 2012. They both believed that there was no point in further bargaining." (p. 8-9); "Even PSCOA's bargaining counterpart, the President and Vice-President of [the Union], admitted that the parties had provided each other with their final offers and had arrived at a deadlock." (p. 9); "Both Mr. Sonnie and

Mr. Blackwell testified at the hearing that they specifically agreed that the parties were at impasse on April 11, 2012. They both believed that there was no point in further bargaining." (p. 11); "[B]oth Mr. Sonnie and Mr. Blackwell specifically agreed that the parties were at impasse on April 11, 2012." (p. 13-14)).[1]

Here, PSCOA raised the arguments regarding the substantive proposals, punitive remedy, and stipulated impasse in multiple exceptions and in its supporting brief. PSCOA's exceptions and briefing encompass the sum and substance of PSCOA's arguments to this Court, and also happen to be consistent with the dissent's reasoning in this case. That PSCOA honed its language to more meaningfully track the precise wording and reasoning used by the dissent does not mean that PSCOA did not raise the arguments before the Board as they share the same predicate.

Moreover, none of the cases cited by the Board suggest that a petition must parse its exceptions into arguments attacking the specific legal underpinnings of the Board's error. Instead, the Board "was sufficiently apprised, for the purpose of section 10(e), of the critical issue[s]…." Trump Plaza Associates, 679 F.3d at 830 (quoting BPH & Co. v. NLRB, 333 F.3d 213, 219 (D.C.Cir. 2003)). "Raising the issue by seeking Board reconsideration would have been an 'empty formality." Id.

[1] See also PSCOA's Cross-Exceptions to ALJ's Decision of May 23, 2014, at ¶¶ 1, 7, 17-18 ("ALJ's failure to find …that the parties were at *lawful impasse*").

(citing Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 727 F.2d 1184, 1192 (D.C.Cir. 1984)). The Board's assertion to the contrary is wholly without merit. As such, this Court has jurisdiction to address Petitioner's arguments.

B. The Board Avoids Addressing PSCOA's Position that the Board Impermissibly Sat in Judgment on the Substantive Proposals Made In Bargaining by Devoting a Majority of its Brief to Criticizing the Substantive Proposals Made in Bargaining.

As a starting point, the Board notes that "*Transmarine* backpay is distinct from the substantive terms of any severance agreement that the parties may reach." Board Br. at 19. PSCOA does not disagree, indeed, the fact that they are distinct is the precise point PSCOA makes in its opening brief. PSCOA Brief, at 27-28. It is for this reason that the Board's lengthy discussion regarding PSCOA's substantive bargaining proposal (which is, in any event, not supported by substantive evidence or legally sustainable) is improper. The purpose of the remedy is achieved no matter what the parties' bargaining position is during negotiations. Until the parties either reach an agreement or impasse, the backpay award continues to increase. Nothing about the parties' substantive bargaining position can change this result.

Thus, as stated in PSCOA's opening brief, PSCOA could not have bargained away the *Transmarine* remedy because it was imposed by the Board – whether the Board erroneously thought PSCOA attempted to do so through its

substantive proposals during bargaining is wholly irrelevant. Nevertheless, PSCOA did not improperly insist on reducing its *Transmarine* backpay.

The Board reaches its judgment on PSCOA's bargaining proposal by relying solely on wording contained in an informal memorandum to file drafted by Todd Eagen. Board Br. at 21. The Board states "the Association informed the Union at the bargaining table that its offer addressed the '*two week backpay remedy the Administrative Law Judge suggested*' and established 'what the *backpay amount* would be.'" Board Br. at 21 (emphasis in original). In order to support its position, the Board cherry picks the record, parses it together, and then requests this Court to read it in a vacuum. The Board, however, not only mischaracterizes this memorandum but also places far too much significance in it.

First, the first-quoted sentence reads in its entirety: "3. That we were going to bargain over the effects of removing the business agents, which included a review of the two week backpay remedy the Administrative Law Judge suggested in this matter." TR: 4/14/14, R-4. Reading this sentence in its entirety, it is apparent that PSCOA understood that bargaining over the "effects" of removing the business agents and the backpay remedy were distinct, though related, concepts. Notably, PSCOA indicated that such a process included a review of the backpay remedy, but did not indicate that the process intended to modify that remedy.

Instead, such an interpretation was invented by the Board through its mischaracterization of the memorandum. Moreover, the ALJ's referenced order did, **in fact**, *suggest* that two weeks backpay was a reasonable severance package under the circumstances. PSCOA I, at 115 (the *Transmarine* "floor of 2 weeks backpay [is] not [an] unreasonable severance package[] in view of the bargaining violation I have found."). Indeed, to the extent there was confusion with semantics below, the ALJ's language – in calling the backpay a severance – was seemingly the source. In any event, in light of the language used by the ALJ in his opinion, the Board is plainly wrong to impute nefarious meaning into the language used in the informal memorandum.

Second, the second-quoted sentence reads in its entirety: "I provided Larry Sonnie with documentation establishing what the backpay amount would be the five removed business agents for a two week period immediately preceding their removal." TR: 4/14/14, R-4. That is, PSCOA simply provided a document setting forth the two week backpay amount without any modifications.

Thereafter, PSCOA solicited proposals from the Union, of which it offered none, and then made an offer to the Union. The substantive proposals made, absent any allegations of bad faith, are irrelevant as the inquiry need go no further. Nonetheless, the Board asserts that PSCOA's proposal to have invalid mileage reimbursements made to employees operate as a credit somehow destroyed the

bargaining process. This assertion is not only not supported by substantial evidence, it is also not legally sustainable. Instead, the Union here was free to reject PSCOA's offer – which it did – and made a counteroffer.

There is no evidence whatsoever that the Union believed PSCOA's proposal was an effort to reduce the *Transmarine* remedy. Likewise, there is not a single piece of evidence to support the conclusion that the Union took PSCOA's proposal as a demand that it waive or agree to a reduction in the *Transmarine* remedy. That conclusion was reached by the Board, not the parties to the actual negotiations.

Instead, the evidence reflects that the parties bargained in good faith and then arrived at a stipulated impasse. Thus, in order to reach its conclusion the Board has impermissibly added its own, singular interpretation of the facts.

Further, unlike the employer in Sawyer of Napa, Inc., 321 NLRB 1120 (1996)[2], PSCOA never took the position that *Transmarine* set a *maximum* of 2

[2] The remainder of the cases cited by the Board, Cont'l Ins. Co., 289 NLRB 579, 584 (1988); Teamsters Local 705 (Randolph Paper Co.), 227 NLRB 694, 694-95 (1977); NLRB v. Gullett Gin Co., 340 U.S. 31, 364 (1951); and Times Herald Printing Co., 315 NLRB 700, 702 (1994), do not stand for the proposition that the parties reached an unlawful impasse, let alone that the impasse was unlawful under the circumstances presented here. Instead, these cases merely prohibited the employer from making offsets to backpay owed under varying circumstances (Cont'l Ins. Co. Randoph Paper, Gullett Gin Co.) or required effects bargaining as a remedy (Times Herald).

weeks' pay or that its backpay liability would not continue to increase during bargaining. There is simply no record evidence to substantiate that conclusion.

Notably, the Board's Brief does not seek to argue that PSCOA (i) took the position that *Transmarine* set a maximum of 2 weeks' pay, or (ii) backpay liability would not continue to accrue after 2 weeks if agreement or impasse was not reached. Board Br. at 19-20. Since PSCOA never took the position that *Transmarine* placed a 2 weeks' ceiling on the amount of severance pay it could be required to furnish, Sawyer of Napa is simply not applicable to this case. PSCOA, here, never "refused to acknowledge or accept its full responsibilities under the *Transmarine* remedy." Board Br., at 20 (quoting Sawyer of Napa, 321 NLRB at 1120).

In addition, there is no evidence that even suggests that the Union believed that PSCOA was attempting to somehow reduce or bargain away the *Transmarine* remedy. Instead, PSCOA, in recognizing its responsibilities, initiated contact with the Union to begin bargaining and bargained in good faith until the parties came to a stipulated lawful impasse. See TR: 4/14/14, at 19.

Moreover, the dissent's position in Sawyer of Napa that "there is no 'correct' or 'incorrect' position in bargaining under the Act," is the proper analysis under the circumstances. PSCOA was not required to offer anything in bargaining so long as it bargained in good faith, as it did here. The Board's decision to the

contrary goes far beyond "oversee[ing] and referee[ing] the process of collective bargaining," Board Br., at 27, and instead, impermissibly encroaches on the substantive aspects of bargaining reserved to the parties under the Act. The Board's decision must therefore be reversed.

C. While Not a Proper Consideration for the Board to Undertake, PSCOA's Substantive Bargaining Proposals Were Lawful and the Impasse Was Legally Cognizable for this Reason as Well.

The Board continues to insist that impasse was not properly reached because PSCOA included mileage reimbursement in its substantive bargaining proposal, and maintains, seemingly on this basis alone, that impasse was not lawful on April 11, 2012, despite no claim that impasse was reached in bad faith. Setting aside the fact that such an inquiry requires the Board to judge the substantive bargaining proposals, the Parties nevertheless properly reached lawful impasse on April 11, 2012.[3]

First, mileage reimbursement is a mandatory subject of bargaining to which the parties could bargain to impasse. Second, even if mileage reimbursement did constitute a permissive subject of bargaining, the evidence is clear that the parties both agreed to bargain over mileage reimbursement.

[3] See Cross-Exceptions of PSCOA and Brief in Support of Cross-Exceptions raising arguments herein in front of the Board below.

Parties engaged in collective bargaining are required to bargain over so-called mandatory subjects—that is, matters that "vitally affect" wages, hours, and other terms and conditions of employment. Bricklayers (Daniel J. Titulaer), 306 NLRB 229, 235 (1992), citing relevant authorities. As to those subjects, the parties may hold to their positions without yielding, even to the point of impasse. But they are not required to bargain, and may not insist to impasse, on so-called permissive subjects, *although the parties may bargain about those matters and include them in an agreement if both sides consent*. NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

Mileage reimbursement is one of the terms and conditions of employment for the business agents just as wages are and just as is the payment of vacation leave. *TR.* at 34. As such, it is a *mandatory* and **not** a permissive subject of bargaining over which the parties can reach impasse. See Shane Steel Processing, Inc., 347 NLRB No. 18, at *3 (2006) (mileage reimbursement is a mandatory subject of bargaining); WPXI, Inc., 299 NLRB No. 72 (1990) (mileage reimbursement is a mandatory subject of bargaining and employer's unilateral change of same constituted an unfair labor practice). Accordingly, because the Board has established that mileage reimbursement is a mandatory subject of bargaining, impasse was properly reached.

The Board argues that the real issue is that PSCOA sought to get credit for allegedly fraudulently obtained mileage reimbursement that might be recovered in a lawsuit. The Board essentially argues that the conditioning of the credit for mileage reimbursement on a promise not seek legal redress in the courts is a permissive subject of bargaining.

While it is true that "the Board has repeatedly held that an employer may not condition bargaining on the withdrawal of unfair labor practice charges or other litigation." WWOR-TV, 330 NLRB 1265, 1265 (2000), that is not the case instantly. First, in WWOR, the employer refused to negotiate at all until the union there withdrew its grievance. That did not happen here and WWOR is distinguishable.

PSCOA did not refuse to bargain nor did PSCOA request that the Claimants withdraw any litigation prior to negotiating on April 4, 2012 or on April 11, 2012. Further, pointing out during those negotiations that PSCOA *might* have the right to recover wrongly paid mileage reimbursement in later litigation did not violate the Act.

Even in WWOR, a Board majority explained that "a union can bargain in good faith with an employer while taking the legal position in other litigation that it was under no such bargaining obligation." Id. at 1266 (citing International Paper Co., 319 NLRB 1253, 1264-1265, 1276 n. 50 (1995), enf. denied on other grounds,

115 F.3d 1045 (D.C. Cir. 1997). The Board majority rejected the dissent's argument that the union's reservation of its contractual right to pursue arbitration was an unlawful condition that excused the employer's later refusals to bargain. Id; see also United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC and Local Union 193-G and PPG Industries, Inc., 356 NLRB No. 127 (2011) (Respondent's declaration that it would only bargain "provisionally" over subjects that PPG failed to present by the first day of bargaining for a new contract, including economic terms merely preserved a contractual litigation position without affecting its willingness and ability to engage in good-faith negotiations, as evidenced by the Respondent's actual conduct at the bargaining table.)

Mileage reimbursement is a mandatory subject of bargaining. PSCOA sought to negotiate over mileage reimbursement that it contended was already wrongly paid. Indeed, as recognized by dissenting Member Miscimarra, "[t]hese issues are grist for the mill of lawful effects bargaining, and they are especially appropriate subjects when the employer, the union and affected employees may wish to resolve all financial issues that exist in relation to lawful terminations of the employment relationships, like those at issue in the instant case." PSCOA III, at 8 (Member Miscimarra, dissenting in part). As such, the parties reached

impasse over mandatory subjects of bargaining—the elements of a severance package.

Alternatively, in the instant action, there is ample evidence of consent to bargain and bargain to impasse over the issue of mileage reimbursement. It is beyond dispute that, while the PSCOA included the issue of mileage reimbursement in its proposal of April 4, 2012, it is equally clear that the Claimants asked the Union to bargain over that issue as well. The evidence is manifest in the Union's April 11, 2012 letter to PSCOA which demanded, *inter alia*, the following:

> Hood: 2 weeks' severance pay, 70 days' vacation, $1,08 unpaid phone bill ***and last 6 week[s] of mileage which was not received.***

TR: 4/14/14, at J-2.

Thus, rather than objecting to the inclusion of an alleged permissive subject of bargaining, the Union sought reimbursement from PSCOA.[4] The Parties then reached a stipulated, lawful impasse.

D. The Backpay Award Was a Sanction on PSCOA Especially Where the Region's Failures Were Manifest.

As set forth in Petitioner's opening brief, the backpay award, beyond the date the parties reached their stipulated bona fide impasse, is a fine that exceeds the

[4] Nonetheless, despite both parties' willingness to discuss the issue, only PSCOA has been punished for having discussed mileage reimbursement.

Board's remedial authority under Section 10(c) of the Act. Moreover, the Board erred in finding that the Region properly refused to process a petition to decertify the Union that had been filed on January 26, 2012 as well as imputing the employees' failure to request the petition be reinstated onto the employer, PSCOA.[5]

At the hearing below, the Region was forced to concede that members of the Union properly filed a petition for decertification in January 2012. What is significant about this is that had—the petition been processed and BARSUEA (the Union) decertified—then the obligation to bargain would have been removed and this case mooted.

Put another way, the General Counsel ***admitted*** that BARSUEA was defunct in September 2012 and that—as a direct result—the requirement to provide a *Transmarine* remedy ended. If that is so, then had the Region followed through with its obligation to process the Petition, then the requirement to provide a *Transmarine* remedy would have ended much sooner than September 2012. The fact that the Region failed to do the job it is statutorily required to do should mean that the Compliance Specification should have been dismissed. The Board erred in finding that the Region properly refused to process the petition.

[5] See Cross-Exceptions of PSCOA and Brief in Support of Cross-Exceptions raising arguments herein in front of the Board below.

Under Section 9(c)(1)(A)(ii), an employee, group of employees, individual, or labor organization may file a decertification petition asserting that the currently certified or recognized bargaining representative no longer represents the employees in the bargaining unit.[6] Such elections are barred, however, for one year following the union's certification by the NLRB. Plus, if the employer and a union reach a collective bargaining agreement, one cannot ask for a decertification election during the first three years of that agreement (the "contract bar"). However, if not barred by contract, under the Act, if 30% or more of the employees in a bargaining unit sign a decertification petition, the NRLB must conduct a secret ballot election to determine if a majority of the employees wish to decertify the union and stop it from any further "exclusive representation." NLRB Casehandling Manual (Part Two) Section 11023.1.

Here, the Region declined to process the petition but instead issued a letter to Shawn Smith indicating that the Region would wait for a decision by the Board on the issue of whether or not the July 19 collective bargaining agreement was valid. TR: 4/14/14, at R-7. If the July 19 collective bargaining agreement was

[6] The showing requirement will be satisfied for a petitioner in a RD case if he/she has submitted cards or a signature list in support of the petition. The showing of interest for a RD petition is clear as to its intent if it indicates that the employees signing the showing no longer wish to be represented by the union. Sec. 11001.7. Signatures authorizing the petitioner to file a decertification petition also are acceptable. Sec. 101.17, Statements of Procedure. NLRB CASEHANDLING MANUAL (PART TWO) Section 11022.2. All of that is extant is this case and the Region has not disputed the validity of the Petition. *See*, R-5; *Tr* 70.

valid, the Board reasoned, that would act as a bar to an election for the following three years. Id. The Region told Mr. Smith that it was "dismissing the petition, subject to reinstatement, if appropriate, upon conclusion of the unfair labor practice proceedings." See id.

The Region's March 7, 2012 letter cites NLRB Casehandling Manual (Part Two) *Representation Proceedings* Section 11730.3(b) as justifying its action in dismissing the Petition. Section 11730.3(b) states that the Board may consider delaying resolution of representational issues where there are:

> Section 8(a)(2) and (5), 8(b)(3), or other charges which allege violations that involve recognition issues . . .[including] . . . allegations of 8(a)(5) or 8(b)(3) failure to recognize or bargain, or 8(a)(1) and/or (3) violations requiring a remedial bargaining order. A determination of merit in such a charge *may* impose conditions upon or preclude the existence of the question concerning representation sought to be raised by the petition. e.g., *Big Three Industries*, 201 NLRB 197 (1973)). Sec. 11733.2(a)(2).

NLRB Casehandling Manual (Part Two) *Representation Proceedings* Section 11730.3(b) (emphasis added).

The fatal flaw in the Region's position was that the Board disposed of the charge on March 23, 2012. Thus, even though Section 11730.3(b) provides that "a determination of merit in such a charge *may* impose conditions upon or preclude the existence of the question concerning representation sought to be raised by the petition," no charge existed ***after*** March 23, 2012.

To the contrary, the precise issue on which the Board raised as a question which could preclude the existence of the question concerning representation, *e.g.*, a contract bar caused by the alleged continued validity of the July 19, 2010 Agreement was specifically eliminated by the Board's March 23, 2012 decision. PSCOA I, at 113 ("McNany had no authority to enter into the July 19 collective bargaining agreement. Thus, that agreement has no legitimacy."). As such, the very reverse of the issue raised by Section 11730.3(b) was true and it was the Region's absolute duty, as of March 23, 2012, to proceed with the Petition to Decertify in order to permit the parties to resolve the question concerning representation.[7]

Fourteen days after the Board's letter, the unfair labor practice proceedings *did* conclude when the Board issued a Decision and Order on March 23, 2012, which specifically found that the July 19 Agreement was void. Despite that specific finding, the Region never reinstated the Petition for Decertification although a determination of whether or not BARSUEA still retained sufficient support in January 2012 would have made a material difference to the issue of

[7] It would indeed be a fatuous argument for one to suggest that the matters about which the Region now complains in the Compliance Specification would form a basis for delay or dismissal of the Petition to Decertify under Section 11730.3(b) since they all occurred subsequent to March 23, 2012 and would have not been ripe until April 11, 2012 at the earliest. The field was clear for the Region to act on the petition to decertify and there was no impediment to commencing proceedings to resolve the question of representation.

whether PSCOA had a duty to bargain over the impact of dismissing the Claimants. The simple fact is that we will never know whether or not BARSUEA retained sufficient support in January 2012 due solely and inescapably to the inaction of the Region.

The Region, other than protesting, offered no explanation of its failure to process the petition. Although the Region's Compliance Officer, Shane Thurman, was present at hearing, the Region objected to his testimony even though his testimony might have provided some record or some explanation of the Region's inaction. The Region's refusal to provide any testimony which would contradict the testimony Mr. Smith or the facts set forth in the petition for decertification should be construed as an admission that the petition was entirely valid. Further, an inference should and must be drawn that the Region had no sufficient explanation for its failure to act.

The simple truth is that Region did not come to this portion of this case with clean hands. The Region could not maintain that PSCOA failed in reaching impasse—the fact of which there is a discernable record created by PSCOA—where the Region itself failed to process a previously filed and presumptively valid petition which would have, potentially, cut off the *Transmarine* backpay period. *Compare, c.f., Compliance Specification* at I(d) ("The *Transmarine* backpay period

ended on September 28, 2012 the approximate date on which the Union became defunct and was no longer able to bargain.").

The Board, without analysis, merely affirms the ALJ's finding that the Region properly refused to process the petition. It likewise erred in finding that the Petition could not have been reinstated until after the Respondent's failure to bargain was remedied. PSCOA III, at 4.

It is simply inequitable as well as a denial of due process for the Region to have sought to sanction PSCOA, and the Board to affirm it, by extending the *Transmarine* backpay obligation through September 28, 2012, especially where the Region's own failures were manifest. Because the harm to PSCOA due solely to the Region's failure to act is so fundamental, the Compliance Specification should have been dismissed by the ALJ and the Board erred in affirming and exceeded its authority under the Act.

2. The Board Erred in Reversing the ALJ's Finding that Claimant Bill Parke Failed to Mitigate his Damages Since he Made a Choice Not to Return to the Correctional Officer Position.

Again, PSCOA did not waive any arguments raised in its opening brief as the same arguments were raised below to the Board.[8] In any event, the Board here continues to attempt to shoehorn this case into the traditional mitigation framework

[8] See Brief of PSCOA in Reply to Exceptions filed by the Office of the General Counsel raising arguments herein in front of the Board below.

despite the fact that it recognized the "unusual contractual arrangement," Board Br. at 40, at issue that distinguishes it from the traditional framework.

In essence, the Board takes the facts of this case, a square peg, and drives them into its round hole, calling it precedent. This is error. Tellingly, the Board wholly ignores PSCOA's arguments regarding Mr. Parke and makes no meaningful argument addressing PSCOA's points.

Instead, the Board cites to its "traditional" case law that has no meaningful tie to the present factual scenario. None of the cases cited by the Board presented a scenario similar to the "unusual contractual arrangement" at issue that would allow the Board to reasonably reach its conclusion to reverse the ALJ on this point.

There is no doubt, on this record, that even considering traditional mitigation principles, Mr. Parke agreed to return to his correctional officer position at the outset and therefore agreed – from the beginning – to return to "nonequivalent" employment as the Board so contends. Mr. Parke's refusal to return to a position that he had agreed to return at the outset was unjustifiable and without good reason. NLRB v. Mastro Plastics Corp., 354 F.2d 170, 174 n.3 (2d Cir. 1965) ("[A] discriminatee is not entitled to back pay to the extent he fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason.").

In fact, the Board's position here sets up a situation where employers and employees could never come to such temporary arrangements, which in fact are a benefit to the employee, because the employee could then never be expected to return to his normal employment. As stated by the Board, he would be fully entitled to just quit. Board Br., at 41. Such a position is nonsensical and would ultimately work to harm employees as employers would avoid putting itself in such positions.

The ALJ below reasonably and properly recognized that the comparison of the two jobs was inapposite here. Everyone, including Mr. Parke, recognized that, at all times, Mr. Parke remained a correctional officer and was always expected to return to that position after his temporary position with PSOCA ended. As such, Mr. Parke's failure to return to that position necessarily constituted a willful failure to seek reinstatement/equivalent work which should have tolled any make whole remedy.

The Board's refusal to recognize Claimant Parke's failure to mitigate, as the ALJ recognized below, is arbitrary, capricious, contrary to the law and the statute, and not supported by substantial evidence.

CONCLUSION

Based on the foregoing reasons, Pennsylvania State Corrections Officers Association petition for review should be granted; the Board's application for enforcement should be denied; and the Board's order should be vacated. Under *Transmarine*, PSCOA owed the affected employees 2-weeks pay. In the alternative, Parke's failed to mitigate his backpay obligation as found by the ALJ.

Respectfully submitted,

/s/ Michael McAuliffe Miller
Edward R. Noonan (D.C. Bar No. 55792)
Michael McAuliffe Miller (D.C. Bar. No. 60250)
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
(717) 237-7182

April 3, 2017

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME, LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This Petitioner's Brief compies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and word limit of Fed.R.App. P. 27(d)(2).

__X__ The reply brief contains 5745 words, excluding parts of the brief contemplated by Federal Rule of Appellate procedure (32)(a)(7)(B)(iii)

_____ The brief uses a monospaced typeface and contains lines of text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

__X__ The brief has been prepared in a proportionally spaced typeface using MS Word 2007 in a 14 point Times New Roman font.

_____ The brief has been prepared in a monospaced typeface using _____ in a characters per inch font.

/s/ Michael McAuliffe Miller
Michael McAuliffe Miller (D.C. Bar No. 60250)
Attorney for Petitioner
Dated: April 3, 2017

CERTIFICATE OF SERVICE

I, Michael McAuliffe Miller, counsel for petitioner and a member of the Bar of this Court, certify that on April 3, 2017, I caused a copy of the attached Reply Brief of Petitioner/Cross-Respondent Pennsylvania State Corrections Officers Association to be filed with the Clerk through the Court's electronic filing system. I further certify that all parties required to be served have been served as follows:

Lawrence Blackwell, Vice President
Business Agents Representing State Union
Employees Association
106 Locust Street
Beech Creek, PA 16822

Linda Dreeben
Micah Jost
Appellate and Supreme Court Litigation Branch
Division of Enforcement Litigation
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

Shane D. Thurman
Compliance Officer
National Labor Relations Board
Region Four
615 Chestnut Street, 7th Floor
Philadelphia, PA 19106

Dated: April 3, 2017

/s/ Michael McAuliffe Miller
Michael McAuliffe Miller, Esquire